SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

NEVADA POLICY RESEARCH INSTITUTE, dba TRANSPARENT CALIFORNIA,

Petitioner,

v.

CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM, et al.,

Respondents.

Case No.: 34-2018-80002962

ORDER AFTER HEARING ON PETITION FOR WRIT OF MANDATE

On October 25, 2019, a hearing was held on the Court's tentative ruling on the petition for writ of mandate. Petitioner was represented by Colleen E. McCarty. Respondent was represented by Kevin Kreutz and Tom Noguerola. Intervenors were represented by Wendi J. Berkowitz. Having considered the parties' papers and arguments, the Court now issues the following final ruling.

BACKGROUND

This is a Public Records Act ("PRA") case that appears to raise an issue of first impression – is the California Public Employees Retirement System ("CalPERS") required to disclose whether individual retirees are receiving service or disability retirement benefits. CalPERS argues this information is protected from disclosure by Government Code section 20230, which provides "[d]ata filed by the board by any member, retired member, beneficiary, or annuitant is confidential, and an individual record shall not be divulged by any official or

employee having access to it[.]" The Court allowed four public employee unions to intervene in this case. The Unions argue disclosing this information would constitute an unwarranted invasion of privacy.

As just noted, this case appears to raise an issue of first impression. It is also more difficult than either party acknowledges. For the reasons stated below, however, the Court concludes that, pursuant to Government Code section 20230, whether a particular retiree is receiving service or disability retirement benefits is confidential and need not be disclosed by CalPERS in response to a PRA request.

FACTUAL BACKGROUND

The facts are quite simple. Petitioner submitted a PRA request to CalPERS seeking a copy of its "2016 pension payout report." Although not described by any party, the Court believes the "pension payout report" is a list, by name, of all CalPERS members currently receiving retirement benefits, and the annual amount of each member's benefit. Petitioner also asked CalPERS for two additional pieces of information about each individual retiree: (1) their final average salary; and (2) their "benefit type (service, disability, beneficiary, etc.)."

CalPERS initially took the position that final average salary was exempt from disclosure, but it ultimately reversed its position and has provided that information to Petitioner.

This case is solely about benefit type. There are three different types of retirement benefits – service retirement, disability retirement, and industrial disability retirement. This is what Petitioner means by benefit type. CalPERS refers to this as "retirement type," and because Petitioner appears to have adopted CalPERS's term, that is also the term the Court will use. (See Pet., Ex. D.)

Each retirement type is governed by its own rules and formulas. In order to be eligible for service retirement, for example, a member must be at least 50 years old, and must have at least five years of state service.[1] (Gov. Code § 21060.) The amount of the member's service retirement benefit is based on a formula that takes into account years of service; age at retirement; and final compensation. (See *Tanner v. Public Employees' Retirement System* (2016) 248 Cal.App.4th 743, 750.) Service retirement might be thought of as 'regular' or 'normal' retirement.

[1] Although this is an oversimplification, it is sufficient for present purposes.

Disability retirement, as the name suggests, is retirement due to a physical or mental disability. It is "intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform his duties." (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1304). In order to be eligible for disability retirement a member must show, based on competent medical opinion, that they are "incapacitated physically or mentally for the performance of" their regular job duties due to a disability that is either permanent or that is expected to last at least 12 consecutive months or to result in death.[2] (Gov. Code §§ 20026, 21156, subd. (a).) An industrial disability is a disability arising out of or caused by employment, and only safety members – generally defined as peace officers and firefighters – are eligible for industrial disability retirement. (Gov. Code §§ 20046, 21151.) There is no minimum age for either type of disability retirement. (Gov Code. §§ 21150, 21151.) A member generally needs five years of service to be eligible for disability retirement. (Gov. Code § 21150.) There is no minimum service requirement for industrial disability retirement. (§ 21151.) Like service retirement, the amount of the disability retirement benefit is based on a formula that takes the member's age, years of service, and final compensation into account. (Gov. Code § 21423.) The amount of the industrial disability retirement benefit generally equals "50 percent of [the member's] final compensation plus an annuity purchased with [the member's] accumulated additional contributions, if any, or, if qualified for service retirement, the member shall receive his or her service retirement allowance if that allowance, after deducting the annuity, is greater." (Gov. Code § 21407.)

In mid-2018, CalPERS provided Petitioner with information on retirement type in summary or aggregate form, but not individualized form. Petitioner wants the information in

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[2] CalPERS stresses the fact that disability determinations are based on medical evidence and opinion. When a member applies for disability retirement they must provide CalPERS with at least a year's worth of medical records relating to the disabling condition; these records must be from a physician specializing in the disabling condition at issue. (Suine Decl., Ex. A, p. 11.) The member must also provide CalPERS with a "Report on Disability" from a physician specializing in their disabling condition. (*Id.*, p. 23.) This Report must include detailed information about the nature of and severity of the member's disability, and what job duties the member is unable to perform due to the disability. (*Id.* ["Physician's Report on Disability" form].) Sometimes, CalPERS will require a member to undergo an "Independent Medical Examination" to determine whether they are incapable of performing their usual job duties due to a disability. (*Id.*, ¶¶17-20.) CalPERS's larger point is that it does not determine whether a member is disabled – physicians do – and that disclosing a person is receiving disability retirement benefits is thus tantamount to disclosing a medical opinion that a member is disabled.

individualized form. In other words, Petitioner not only wants to know that Jane Doe is receiving $50,000 a year in retirement benefits; it also wants to know whether Jane Doe is receiving a service retirement, a disability retirement, or an industrial disability retirement.

As noted above, CalPERS argues this information is exempt from disclosure by Government Code section 20230, which provides "[d]ata filed by the board by any member, retired member, beneficiary, or annuitant is confidential, and an individual record shall not be divulged by any official or employee having access to it[.]" The Unions argue disclosure of this information would constitute an unwarranted invasion of privacy.

ANALYSIS

1. The Public Records Act

Courts have long recognized that openness in government is essential to the functioning of a democracy. (*International Federation of Professional and Technical Engineers v. Superior Court* (2007) 42 Cal.4th 319, 328 ["*International Federation*"].) As our Supreme Court explains, "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.)

The Legislature codified the public's right of access to government records in 1968, when it enacted the PRA. In doing so, the Legislature found and declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code § 6250.)[3] To secure this right, the PRA provides that "every person has a right to inspect any public record, except as hereafter provided." (§ 6253(a).) Thus, all public records are subject to disclosure unless specifically exempted by the PRA. (*Williams v. Superior Court* (1993) 5 Cal.3th 337, 346.) Disclosure is favored and a long line of cases directs that any exemption from disclosure must be narrowly construed. (See *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1276 [citing cases].)

The people's right to know, however, "is not absolute," and the PRA contains a number of exemptions which, as noted, must be narrowly construed. (*Humane Society of the United States v. Superior Court* (2013) 214 Cal.App.4th 1233, 1254; §§ 6254, 6255.) As the parties

[3] Further undesignated statutory references are to the Government Code.

seeking to withhold public records, CalPERS and/or the Unions bear the burden of demonstrating that an exemption applies. (§ 6255; *International Federation, supra*, 42 Cal.4th at 329.) In other words, it is not Petitioner's burden to show the records are not exempt, but CalPERS and the Unions' burden to show they are.

2. Government Code section 20230

The PRA exempts from disclosure, "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law . . . ." (§ 6254, subd. (k).) Government Code section 20230, which is part of the Public Employees Retirement Law, or PERL, provides, "*Data filed with the board by any member, retired member, beneficiary, or annuitant is confidential, and an individual record shall not be divulged* by any official or employee having access to it to any person other than" (1) the member or his or her authorized representative, (2) the member's employer, or (3) a state department or agency. (§ 20230, subd. (a), italics added.)[4] The first issue in this case is whether retirement type constitutes "[d]ata filed with the board by any member" or "an individual record" within the meaning of section 20230. If it does, then such information is exempt from disclosure under the PRA.[5]

Although none involved the precise issue raised here, three Attorney General opinions have interpreted the scope of section 20230 (or, more precisely, its predecessor, section 20134)[6] and Government Code section 31532, a similar confidentiality provision in the County Employees Retirement Law, or CERL. These three Attorney General opinions were extensively discussed in a series of appellate cases decided in 2011 regarding the scope of Government Code section 31532. (See *Sacramento County Employees Retirement Sys. v. Superior Court* (2011)

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[4] It also provides, "The gross amount of any benefit or any refund of a PERS contribution due to a member, retired member, or beneficiary under this part is not confidential and may be released upon request to the board." (*Id.*, subd. (c).)

[5] The Court notes that, unlike the privacy exemption discussed below, this particular exemption does not require any balancing of the public's interest in disclosure.

[6] Section 20134 was renumbered as section 20230 in 1995. (*Sacramento County Employees Retirement Sys. v. Superior Court* (2011) 195 Cal.App.4th 440, 457.) It was almost identical to section 20230. It read: "Data filed by any member or beneficiary with the board is confidential, and no individual record shall be divulged by any official or employee having access to it to any person other than the member to whom the information relates or his authorized representative, the contracting agency by which he is employed, any state department or agency, or the University." (*Id.* [quoting former section 20134].)

195 Cal.App.4th 440; *San Diego County Employees Retirement Assn. v. Superior Court* (2011) 196 Cal.App.4th 1228; *Sonoma County Employees Retirement Assn. v. Superior Court* (2011) 198 Cal.App.4th 986.) All three appellate cases held that CERL's confidentiality provision does not exempt the names and pension amounts of retired public employees from disclosure under the PRA.[7] Because the three appellate cases have similar, and lengthy, names, the Court refers to them as *Sacramento County*, *San Diego County*, and *Sonoma County*, respectively. The Court discusses all three Attorney General opinions and all three appellate cases below.

As noted, CERL's confidential provision (section 31532) is similar to PERL's confidentiality provision (section 20230). Section 31532 provides, "*Sworn statements and individual records of a member shall be confidential and shall not be disclosed* to anyone except insofar as may be necessary for the administration of this chapter or upon order of a court of competent jurisdiction, or upon written authorization by the member." (Italics added; compare § 20230 ["Data filed with the board by any member . . . is confidential, and an individual record shall not be divulged"].) CERL also provides county retirement boards must adopt regulations regarding the "filing of a sworn statement" by each member, "showing date of birth, nature and duration of employment with the county, compensation received, and such other information as is required by the board." (§ 31526, subd. (b).) In interpreting these provisions, the *Sacramento County* court held that section 31532 "clearly referenced the sworn statements required to be filed *by* the member," and that such statements are exempt from disclosure under the PRA.[8]

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[7] In many ways, these three cases were simply the logical extension of our Supreme Court's holding in *International Federation* that the name and salary of every public employee is a matter of public record. (*International Federation*, *supra*, 42 Cal.4th at 331-32.) After all, a pension is analogous to a salary, because a pension is simply income in retirement, while a salary is income during employment. Petitioner suggests that this case is the logical extension of *International Federation*, *Sacramento County*, *San Diego County*, and *Sonoma County*, and that those four cases dictate the result here as well. It is not that simple, however, because disclosing the amount of a public employee's retirement benefit is qualitatively different than disclosing whether the employee is receiving that benefit due to years of service or due to a physical or mental disability.

[8] The Court notes, however, that not all information on the sworn statements is exempt. For example, and as just quoted, the sworn statement includes "nature and duration of employment" and "compensation received." (§ 31526, subd. (b).) We know from our Supreme Court's decision in *International Federation*, however, that "compensation received" is not exempt from disclosure – even if it is included on the sworn statement. (*International Federation*, *supra*, 42 Cal.4th at 331-32.) Moreover, we know from *Sacramento County* that "duration of employment" is not exempt from disclosure. (*Sacramento County*, *supra*, 195 Cal.App.4th at 465 ["The

(*Sacramento County, supra*, 195 Cal.App.4th at 456, italics in original.) As for "individual records," the *Sacramento County* court held it "refers to information provided *by* a member or on the member's behalf (such as medical reports), *to* SCERS, and *not* all records that *pertain to* or *relate to* a member." (*Id.* at 463, italics in original.)

Although the language of section 31532 is not identical to the language of section 20230, the *Sacramento County* court suggested the two provisions should be interpreted the same way when it held, "It seems clear that 'individual record' in the CalPERS statute mean[s] data filed *by* a member or beneficiary, as with the *analogous* . . . [CERL] statutes." (*Sacramento County, supra*, 195 Cal.App.4th at 457, first italics in original, second italics added.) The *Sonoma County* court reached the same conclusion when it held that sections 20230 and 31532 contain "essentially the same language" and must be interpreted as affording the "same level of confidentiality" to state and county retirees because "[t]here [is] no rational reason for the Legislature to treat public employees and pensioners subject to the two laws differently in that respect." (*Sonoma County, supra*, 198 Cal.App.4th at 1000-01.) Here, neither party suggests that section 20230 should be interpreted any differently than section 31532. The Court thus assumes they have the same meaning, and that the cases discussing section 31532 are equally applicable here.

The issue in *Sacramento County*, *San Diego County*, and *Sonoma County* was whether *the amount* of retirement benefits paid to retirees is exempt from disclosure under the PRA – not whether *retirement type* is exempt. The three Attorney General opinions, however, did consider whether information similar to retirement type is disclosable (although some considered it more directly than others), and all three appellate cases quoted extensively from those three opinions. The Court thus discusses the Attorney General opinions in some detail.

The first Attorney General opinion was issued in 1955. (25 Ops. Cal. Atty. Gen. 90 (1955).) There, the State Controller had asked whether he could lawfully disclose whether a former state employee is being paid a retirement allowance and the amount of such allowance. The opinion concluded the names and retirement allowances of retired state employees are public records and are thus open to public inspection. In reaching this conclusion, the opinion

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confidential record does *not* include the name, date of retirement, department retired from, last position held, **years of service**, base allowance, cost of living adjustment, total health allowance and monthly pension benefit of each retiree."] [italics in original, bold added].)

first noted that section 20134 (now section 20230) states "[d]ata filed by any member . . . with the board" and "individual records" are confidential and shall not be disclosed. The opinion then noted it had previously interpreted an identical provision in the State Teachers' Retirement Act and had concluded "the individual addresses in the office of the Teachers' Retirement System were part of the data required to be filed by members . . . and were therefore confidential." (*Id.* at 91.) It then held the following:

> ***Examples of the information guarded by section 20134*** [now 20230] ***are*** addresses of members and beneficiaries, ***statements as to*** age and ***disability***, names of relatives and dependents, ***retirement option elections and similar matters***. **Utilizing such guarded information, the Retirement System calculates the monthly payment due each beneficiary. It then makes up and certifies to the Controller a monthly claim, supported by a roll which bears the names of individual payees and the amounts of individual payments** (see Board of Control Rules 622–624, 656). The roll is used by the Controller as the basis for drawing individual warrants in favor of the individual payees. **This roll is not 'data filed by any member or beneficiary,' nor is it an 'individual record.' Rather, it is a composite document which is the written act or record of the act of a public officer** [citation]. Thus the roll is outside the limited class of records guarded by section 20134 and within the larger category of public records. In our view, therefore, the names and amounts shown on the roll are open to public inspection. . . .
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> We have reached this conclusion by simple deduction from the express provisions of section 20134. Thus there is no real occasion to explore the legislative intent. We may observe, however, that our conclusion does not negate the Legislature's apparent objective. . . . Granting that the statute intends to safeguard certain personal information, nevertheless it is a fact that the name of every public officer and employee, as well as the amount of his salary, is a matter of public record. Thus the state-paid income of a retired person is no less open to the public gaze than the income of any active state officer or employee.

(*Id.*, emphasis added.) The italicized language provides CalPERS's strongest argument; the underlined language provides Petitioner's strongest argument. Both arguments will be discussed in more detail below.

The second Attorney General opinion was issued in 1956. (27 Ops. Cal. Atty. Gen. 267 (1956.) There, CalPERS had asked whether eleven categories of information were or were not confidential, including, as relevant here, (1) the "amount and detail of calculation of the service

or disability retirement allowance payable" to retirees, and (2) "[r]ecords and statements of physical or mental disability or condition received from sources other than the member or beneficiary." (*Id.* at 268.) The opinion concluded this information was made confidential by section 20134 (now 20230) and was not subject to public inspection. The opinion explained:

> Section 20134 does two things, it makes confidential the data filed by a member and then goes on to forbid disclosure of individual records to unauthorized persons. A suggestion has been made that that portion of the section which forbids disclosure of individual records has reference only to data filed by the member, and does not cover information that comes to the system from other sources. Any such view should mean that the name, address, date of birth of the member, and the name of his beneficiary would be kept from public inspection, but that the amount of his contributions and any reports as to his physical and mental condition would be available for inspection by anyone who desired to do so. It would seem that the latter class of information even more than the first should enjoy the protection of the statute. If anything is to be kept from public scrutiny it would seem to be the reports concerning the member's mental and physical condition.
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> Aside from practical considerations *the wording of the section would indicate that all information pertaining to the individual and not simply that which is given by him is to be protected.* Section 20134 does not absolutely prohibit the release of information; it provides that the information shall not be divulged to anyone other than the member, his authorized representative, or his employer. Information which is otherwise confidential may then be given to the member. What information is this? It seems hardly necessary to authorize the release of information to the member of information as to his age, address or beneficiary; the system obtained this from the member himself. What the member would be seeking would be the information coming from other persons. The information which is not to be divulged except to authorized persons does then include the material which is obtained from sources other than the member.

(*Id.* at 268-69, italics added.) Applying this interpretation to the particular question being asked, the opinion concluded that the amount and detail of calculation of a member's service or disability retirement allowance, and records and statements of physical disability, "even though not data filed by members[,] do pertain to individual members and are kept as part of the individual records of members. Such information is confidential and is not to be given out." (*Id.* at 269.) The 1956 opinion did not mention the 1955 opinion or its (contrary) conclusion that *the amount* of a public employee's retirement benefit is not confidential and is subject to public

inspection.

The third Attorney General opinion was issued in 1977. (60 Ops. Cal. Atty. Gen. 110 (1977).) There, a county retirement system had asked two questions. The first was whether the names and pension amounts of retirees were public records and subject to inspection by the public or the press. The answer to the first question was ***yes***, based on the same reasoning as the 1955 opinion. The 1977 opinion noted that the language of sections 31532 and 20134 was "somewhat different," but that "the obvious purpose and intent of both sections are quite similar, that is, to maintain the privacy of retired employees." (*Id.* at 111.) It thus interpreted section 31532 the same way it had interpreted section 20134 in the 1955 opinion, and it held "the records of the county auditor/controller showing the names and amounts paid to retirees are public records and are subject to the inspection of the public or the press." (*Id.* at 113.)

As potentially relevant here, the second question was whether the following documents pertaining to disability hearings were public records: the hearing transcript; the hearing officer's decision; the application for disability retirement; medical reports; the decision of the Workers' Compensation Board; depositions of witnesses; any other evidence. The 1977 opinion held these records are confidential, based on the same reasoning as the 1956 opinion, which it quoted extensively. (*Id.* at 113-14.)

As noted above, all three appellate cases quoted extensively from all three Attorney General opinions. They all held, however, that the 1955 and 1977 opinions were more persuasive than the 1956 opinion – at least as to some issues.

For example, the *Sacramento County* court held that the 1956 opinion "used overly broad language to define the confidentiality of pension records" and/or "was unintentionally overbroad," while the 1955 and 1977 opinions "properly state a narrower scope of confidentiality which we ultimately adopt in this case." (*Sacramento County*, *supra*, 195 Cal.App.4th at 456 and fn.4.) The *Sacramento County* court did not disclaim the 1956 opinion in its entirety, however. Instead, it noted the 1956 opinion "was motivated to ensure that in addition to information filed *by* members, information *about* members filed by others on their behalf, such as contribution amounts and medical reports, would be protected. However, it was phrased broadly to state that 'all information *pertaining to* the individual' was confidential." (*Id.* at 460, italics in original.) The court also noted "the 1956 Attorney General opinion itself was primarily concerned with protecting material filed *on behalf of members*, such as medical reports. Indeed,

the only published case cited by the parties that mentions section 31532 stands for the narrow proposition that a medical exam required to be given to a safety member would remain confidential." (*Id.* at 461, italics in original.) Finally, it noted that the 1977 opinion "clarified that the 1956 Attorney General opinion pertained to records concerning a member's medical and physical condition. This interpretation is in accord with our earlier observation that, notwithstanding broad language used in the 1956 opinion, its intended *application* was narrow." (*Id.* at 463, italics in original.) This suggests that the *Sacramento County* court may have agreed with the 1956 opinion's ultimate conclusion that records regarding a retiree's medical and physical condition or disability and (possibly) details regarding how a retiree's benefit was calculated are confidential, and that where the 1956 opinion erred was in stating that *all* information "pertaining to" an individual is confidential.

Like the *Sacramento County* court, the *San Diego County* court held that section 31532 exempts from disclosure the "sworn statements" of members. It also held the phrase "individual records of members" did *not* include "records a retirement system creates for purposes of conducting the governmental function of calculating and paying out monthly pension benefits," but that it may include "personal records pertaining to such issues as physical or mental health." (*San Diego County*, *supra*, 196 Cal.App.4th at 1237-38.) In reaching this conclusion, the court quoted extensively from the three Attorney General opinions, and, like the *Sacramento County* court, it was "more persuaded by the reasoning of the 1955 and 1977 opinions," and it "decline[d] to follow the 1956 opinion." (*Id.* at 1239.)

Like the *Sacramento County* and *San Diego County* courts, the *Sonoma County* court found portions of the 1956 Attorney General opinion "utilized overly broad language." (*Sonoma County*, *supra*, 198 Cal.App.4th at 1001.) And like the *Sacramento County* court, the *Sonoma County* court did not disclaim the 1956 opinion in its entirety – just its broad statement that "all information pertaining to the individual" is confidential:

> It is true . . . that the 1956 opinion contains an inclusive definition of "individual records"—"all information pertaining to the individual" . . . . Read closely, however, the [1956] opinion is mainly concerned with the question of whether the term "individual records" includes information provided to the retirement system *about* members, or only information provided *by* them. The opinion's "all information" formulation seemed to be intended to ensure both of these categories of information would be covered so that medical and psychiatric reports would not be

> left unprotected merely because they are not provided by members. The opinion fails to consider that gross benefit payment amounts calculated by the retirement system are *neither* information supplied by the member *nor* information submitted to the retirement system about the member.

(*Id.* at 998, italics in original, underlining added.) Like the *Sacramento County* court, the *Sonoma Court* court appears to have agreed with the 1956 opinion's conclusion that medical and psychiatric information was confidential and may not be disclosed.

In one respect, the *Sonoma County* court arguably went further than either the *Sacramento County* or *San Diego County* courts. Of particular relevance here, it held as follows:

> [W]e believe the Legislature's intent . . . was primarily to ensure that information about members given to CERL retirement systems by third parties, such as employers and doctors, would have the same confidentiality as the information the members were required to provide about themselves in their sworn statements. The Legislature would have reasonably understood that the "individual records of members" in section 31532 would encompass the types of information held to be confidential by *both* the 1955 and 1956 [Attorney General] opinions: the amount of a member's monthly and accumulated retirement contributions, records and statements of physical or mental disability, outgoing correspondence to the member or member's employer, service credit records including cost and purchase information for special service credits, and the *details* of how retired members' monthly gross benefit amounts were calculated (but not the resulting amounts).

(*Id.* at 1002-03, italics in original, underlining added.)

The *Sonoma County* court also held:

> [CERL's] confidentiality provisions . . . encompass all otherwise nonpublic information furnished to the board either *by* the member or by any third party *about* an individual member. This formulation protects such personal information as the member's birth date and age, but does not protect otherwise public information such as the department or agency the member retired from or their salary at retirement. Most importantly, section 31532 also does not protect the names and gross benefit amounts of retired members or their beneficiaries, since the gross benefit amounts are calculated by the retirement system itself.
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> The fact that benefit amounts might be calculated using confidential information does not affect our conclusion. . . . Here, due to the number of variables involved in calculating a retiree's benefit, disclosing the amount of the benefit does not disclose any of the otherwise confidential information used to determine in.

(*Sonoma County, supra*, 198 Cal.App.4th at 1003, italics in original, underlining added.) Arguably, retirement type is the type of "personal" and "otherwise nonpublic information" that is not itself disclosable, even though it is one of the "variables involved in calculating a retiree's benefit."

The *Sonoma County* court stated its interpretation of section 31532 was, "for all practical purposes," the same as the *Sacramento County* court's interpretation "despite the slight difference in wording," and "we believe the result we reach is consistent with that adopted in *Sacramento* [*County*]." (*Id.* at 1004.)

Based on the above, it is clear to the Court that any medical records, reports, or opinions provided to CalPERS to support (or deny) a member's application for disability retirement benefits are confidential, and Petitioner does not suggest otherwise. CalPERS's lengthy discussion about the types of medical records it solicits, receives, and reviews when determining whether a member is eligible for disability retirement is thus somewhat beside the point. Petitioner does not seek those records.[9] It simply wants to know whether a retiree is receiving a service retirement or a disability retirement. It does not seek any information about the nature of the disability, and it does not seek any of the underlying medical records.

Is the mere fact that a retiree is receiving a disability retirement benefit or a service retirement benefit exempt from disclosure? That is a much more difficult question, and it is not directly answered by the appellate cases or the Attorney General opinions discussed above. CalPERS argues it is exempt – but its argument focuses entirely on issues related to disability retirement, and it is thus not obvious why its arguments would necessarily apply to members receiving service retirement benefits.[10]

In any event, CalPERS notes that the determination that a member is eligible for

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[9] In its reply, Petitioner acknowledges it "in no way disputes the confidentiality of individual medical records provided by the member or a third party." (Reply at 4:28 to 5:1.)

[10] To which Petitioner responds that CalPERS should – at a minimum – disclose the names of those members receiving service retirement benefits. If – as the Court concludes – Petitioner is not entitled to records disclosing which retirees are receiving disability retirement benefits, then it cannot avoid that bar by seeking only records disclosing which retirees are receiving service retirement benefits, because disclosing which retirees are receiving service retirement benefits would necessarily identify those retirees receiving disability retirement benefits. Moreover, and perhaps more importantly, the Court concludes that "retirement option elections" are confidential, and that retirement type is a type of retirement option election.

disability retirement must be based on "competent medical opinion." (§ 20026.) CalPERS contends that Petitioner essentially seeks disclosure of a "medical opinion" provided to it by a physician on a member's behalf about whether that particular member is disabled. (Opp. at 10:17.) It thus argues the information Petitioner seeks is "[d]ata filed with the board" within the meaning of section 20230. Alternatively, and to quote *Sacramento County*, it argues Petitioner seeks "information provided *by* a member or on the member's behalf (such as medical reports), *to* [CalPERS]," which is exempt from disclosure. (*Sacramento County*, *supra*, 195 Cal.App.4th at 463, italics in original.) In other words, a member cannot receive disability retirement benefits unless: (1) the member files an application with CalPERS stating she is disabled and providing information on the disability, (2) the member and/or her physician files medical records with CalPERS documenting the disability, and (3) a physician files a report with CalPERS stating the member is disabled. Disclosing that a member is receiving disability retirement benefits is tantamount to disclosing this information – all of which is provided *by* the member or on the member's behalf, *to* CalPERS. The Court finds this argument is persuasive.

Moreover, as CalPERS accurately notes, all three appellate cases essentially adopted the 1955 Attorney General opinion's interpretation of section 20230, and that Attorney General opinion held: "Examples of the information guarded by section 20134 [now 20230] are . . . *statements as to . . . disability* . . . [and] *retirement option elections* and similar matters." (25 Ops. Cal. Atty. Gen. at 91, italics added.) Perhaps upon further review, and faced with the precise issue raised in this case, the appellate courts would find the italicized portion of the 1955 opinion to be too broad. Unless and until an appellate court does so, however, this Court feels bound by that opinion's holding that *statements as to disability* and *retirement option elections* are within the class of documents made confidential by section 20230, and thus exempt from disclosure under the PRA. This Court is also bound by the *Sonoma County* court's holding that the Legislature intended that "statements of physical or mental disability" are confidential. (*Sonoma County*, *supra*, 198 Cal.App.4th at 1003.) The Court finds that the disability retirement type in particular is akin to a statement as to disability – i.e., it is a statement that a particular retiree is disabled. The Court also finds that retirement type in general is akin to a retirement option election (i.e., an election to seek service, disability, or industrial disability retirement). In this regard, the Court notes that CalPERS's application for disability retirement is called "Disability Retirement *Election* Application." (Suine Decl., Ex. A, italics added.)

The Court also notes that although all three appellate cases held the 1956 Attorney General opinion was too broad in some respects, the *Sacramento County* and *Sonoma County* courts appear to have agreed with its ultimate conclusion that records concerning a retiree's medical or physical condition are confidential. (See *Sacramento County*, *supra*, 195 Cal.App.4th at 463; *Sonoma County*, *supra*, 198 Cal.App.4th at 1003.) A record showing that a particular individual is receiving a disability retirement benefit is akin to a record concerning that individual's medical or physical condition, because it shows that the individual suffers from a permanent or long-lasting physical or mental disability. (§ 20026.)

Moreover, and as noted above, the *Sonoma County* court arguably went further than the other two appellate cases when it held that CERL's confidentiality provision (and by analogy, PERL's confidentiality provision) exempted from disclosure "the *details* of how retired members' monthly gross benefit amounts were calculated (but not the resulting amounts)." (*Sonoma County*, *supra*, 198 Cal.App.4th at 1003, italics in original.) If "the details of how . . . gross benefit amounts were calculated" are confidential, then arguably so is retirement type, because the details of that calculation would disclose whether the member was receiving service retirement, disability retirement, or industrial disability retirement. Petitioner has been provided with the resulting benefit amounts. The Court concludes it is entitled to no more.

As noted above, after holding that things like statements as to disability and retirement option elections are "guarded" (i.e., made confidential) by section 20230, the 1955 Attorney General opinion went on to hold the following:

> Utilizing such guarded information, the Retirement System calculates the monthly payment due each beneficiary. It then makes up and certifies to the Controller a monthly claim, supported by a roll which bears the names of individual payees and the amounts of individual payments . . . . This roll is not 'data filed by any member or beneficiary,' nor is it an 'individual record.' Rather, it is a composite document which is the written act or record of the act of a public officer [citation]. Thus the roll is outside the limited class of records guarded by section 20134 and within the larger category of public records.

(25 Ops. Cal. Atty. Gen. at 91.) Petitioner argues that – just like monthly payment amount – retirement type is a designation created by CalPERS, utilizing "guarded information," and that this CalPERS-created designation is open to public inspection, even if the "guarded information" on which it is based is confidential. This is Petitioner's strongest argument. This argument also

finds some support in the *San Diego County* court's holding that the term "individual record" "cannot reasonably be interpreted to include . . . records . . . which [the retirement system] creates and uses to facilitate the period payments of pension benefits." (*San Diego County*, *supra*, 196 Cal.App.4th at 1241.) Thus, this Court concludes that: (1) retirement type is akin to a retirement option election, which the 1955 Attorney General opinion held is made confidential by section 20230; and (2) disability retirement type is a statement as to disability, which both the 1955 Attorney General opinion and the *Sonoma County* court held is made confidential by section 20230.

3. Privacy

The Unions argue that whether a particular retiree is disabled is information that is protected by the right to privacy guaranteed by the California Constitution. These particular Unions represent peace officers, highway patrolmen, firefighters, and first responders. They note that it is not at all unusual for peace officers and other first responders to suffer from physical injuries, psychological and emotional distress, post-traumatic stress disorder, and depression, and that many of these injuries and conditions are job-related. (See generally Feyh Decl. and Lane Decl.) They state that peace officers and first responders often see themselves as "people to whom others look to be strong and to protect them when they are in danger." (Feyh Decl., ¶ 6.) Signs of weakness or perceived weakness are "unwelcome and highly damaging to their self-image," and they are thus often reluctant to admit they suffer from emotional or psychological distress because of "the stigma attached to those experiencing emotional distress," and because they worry "their reputation will suffer and their dignity and self-respect will disappear." (*Id.*; Lane Decl., ¶ 5.) The Unions thus believe their members will be less likely to seek help for disabling conditions if they know that CalPERS may publically disclose the fact that they are disabled. The Unions also note that some disabilities – like post-traumatic stress disorder, nerve damage, or certain cancers – are effectively "hidden" and cannot be seen by casual observers, even though they may in fact prevent someone from performing their usual job duties. (Lane Decl. ¶¶ 7-8; Feyh Decl., ¶¶ 9-10.) The Unions thus worry that publicly identifying (or "outing") retirees who receive disability retirement benefits will lead to harassment, bullying, and "vigilante justice" by those who erroneously believe they are not actually disabled. (Opp. at 20:23-24.)

As the parties note, the California Constitution guarantees *both* the individual's right of privacy, (Cal. Const., art. I, § 1), *and* the public's "right of access to information concerning the public's business," (Cal. Const., art. I, § 3, subd. (b)(1)). When it enacted the PRA, the Legislature expressly recognized both rights when it stated that it was "mindful of the right of individuals to privacy," and also that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (§ 6250.) As explained by one court:

> Disclosure of public records has the potential to impact individual privacy. The [PRA] defines "public records" broadly to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." [Citations.] Public records can include "personal details about private citizens," and disclosure may infringe upon privacy interests. [Citations.]
>
> Disclosure of public records thus involves two fundamental yet competing interests: (1) prevention of secrecy in government; and (2) protection of individual privacy.

(*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1016-17.)

The Unions argue information on retirement type is exempt from disclosure by section 6254, which provides the PRA "does not require the disclosure of . . . [p]ersonnel, medical, or similar files, the disclosure of which would constitute an *unwarranted invasion of personal privacy.*" (§ 6254, subd. (c), italics added.) This exemption requires the court to "balance two competing interests, both of which the [PRA] seeks to protect—the public's interest in disclosure and the individual's interest in personal privacy." (*International Federation, supra*, 42 Cal.4th at 329-30; see also *Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 240.) As with all PRA exemptions, the burden is on the Unions to justify the need for nondisclosure. (*New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579, 1585.)

The Unions argue that records showing an individual is disabled implicate that individual's privacy rights. The Court agrees. As was noted 40 years ago in *Board of Medical Quality Assurance v. Gherandini* (1979) 93 Cal.Ap.3d 669, 678 ("*Gherandini*"), "A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." The *Gherandini* court supported

its holding by citing 12 earlier cases.[11] Numerous cases since *Gherandini* have reaffirmed its core holding that a person's medical condition is confidential. (See, e.g., *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 41 [person has legally protectable interest in "informational privacy – an interest in limiting disclosure of confidential information about bodily condition."]; *Department of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363, 374 ["medical information is by its nature confidential and widely treated as such."]; *People v. Martinez* (2001) 88 Cal.App.4th 465, 474-75 ["It is settled that a person's medical history, including psychological records, falls within the zone of informational privacy protected" by the California Constitution].) Moreover, and to paraphrase another case, the Court recognizes that many people may be uncomfortable with the prospect of others knowing they are disabled; that many people would share that information only on a selective basis; and that publicly disclosing a person is disabled may cause discomfort or embarrassment. (See *International Federation, supra*, 42 Cal.4th at 331.)

Petitioner claims its PRA request "does not in any way implicate protected private information" because it merely seeks a "one-word designation" (i.e., service retirement or disability retirement) and it does not seek any of the underlying medical records used to support the disability determination. (Reply at 9:17-20.) Petitioner also suggests it seeks only "financial information" about retirees.[12] (Reply at 3:5-6.) The Court disagrees. Although Petitioner does not seek either the underlying medical records or detailed medical information about retirees, it does want to know which retirees are receiving disability retirement benefits, and disclosing this information will necessarily entail disclosing which retirees are disabled. Whether a person is

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[11] *Burrows v. Superior Court* (1974) 13 Cal.3d 238; *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652; *White v. Davis* (1975) 13 Cal.3d 757; *Carlson v. Superior Court* (1976) 58 Cal.App.3d 13; *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825; *Rudnick v. Superior Court* (1974) 11 Cal.3d 924; *Britt v. Superior Court* (1978) 20 Cal.3d 844; *Tavernetti v. Superior Court* (1978) 22 Cal.3d 187; *In re Lifschutz* (1970) 2 Cal.3d 415; *Camara v. Municipal Court* (1967) 387 U.S. 523; *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259; *Stanley v. Georgia* (1970) 394 U.S. 557.

[12] At the hearing, Petitioner stated that disability benefits are tax-free, and that the disability retirement type is simply a "tax status." The issue appears more complicated than Petitioner's brief statement suggests. (See, e.g., *Take v. Commissioner* (1986) 804 F.2d 553; 26 C.F.R. 1.104-1.) In any event, and as explained herein, the Court finds that disclosing which retirees are receiving disability retirement benefits will disclose private medical information and not simply a tax status.

disabled is not mere "financial information" as Petitioner suggests, but is instead private information concerning a person's medical and/or psychological profile which, as the *Gherandini* court held, concerns an "area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." (*Gherandini, supra*, 93 Cal.Ap.3d at 678.)

That is not, of course, the end of the inquiry. "[P]rivacy interests are not absolute" and "[t]hey must be balanced against other important interests." (*Los Angeles Unified School Dist., supra*, 228 Cal.App.4th at 238.) In performing this balancing test, the court must consider the nature, extent, gravity, and actual or potential impact of the alleged invasion of privacy. (*Hill, supra*, 7 Cal.4th at 37.) "[T]he court must determine whether disclosure of the information would compromise substantial privacy interests; if privacy interests in given information are *de minimis* disclosure would not amount to a clearly unwarranted invasion of personal privacy[.]" (*Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 818, internal quotes omitted.)

Here, the Court notes that Petitioner does not seek any details about an individual's disability. Instead, it seeks only a one or two word designation – i.e., *disability* or *industrial disability*. The Court acknowledges that disclosing a retiree has a disability could constitute an invasion of privacy for some people.[13] However the seriousness of that invasion is greatly diminished by the fact that no other information is disclosed. To give one example, disclosing that Jane Doe has post-traumatic stress disorder or ovarian cancer would be far more invasive than simply disclosing that Jane Doe is receiving disability retirement benefits.

If an expectation of privacy is not a reasonable one, it is "entitled to diminished weight in the balancing test" the court must apply. (*International Federation, supra*, 42 Cal.4th at 331.) "A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." (*Id.*) "Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy." (*Hill, supra*, 7 Cal.4th at 36.) For example, "customs [and] practices . . . surrounding particular activities may create or inhibit reasonable expectations of privacy." (*Id.*)

Here, as CalPERS acknowledges, it publicly discloses information on disability status in

[13] It seems apparent that not all people would consider disclosing the fact that they have a disability to be invasive. For example, numerous people with disabilities drive vehicles that display a disabled person placard or license plate with no apparent ill effects.

certain circumstances. If CalPERS denies a member's application for disability retirement, the member may appeal that decision, in which case a hearing is held before an administrative law judge ("ALJ"). The ALJ's decision is then either adopted or rejected by the CalPERS board at a public meeting. Petitioner has proffered a copy of the agenda for one such public meeting held in September 2019. The agenda lists 19 cases involving either an ALJ decision or a petition for reconsideration, along with supporting documents; the majority of these cases involve applications for disability or industrial disability retirement. Any member of the public can obtain this information from CalPERS's website, and thus can obtain detailed information about the claimed disabilities of individually identified CalPERS members. This information is far more intrusive than the information sought by Petitioners, and includes verbatim quotes and detailed descriptions of members' medical records. Thus, any CalPERS member who applies for disability retirement must expect that if the application is denied and the denial is appealed, then detailed information about the alleged disability will be made public. Although this fact is not dispositive, it arguable tempers the reasonableness of a member's expectation that their receipt of disability retirement benefits will remain confidential and will not be disclosed to the public.

The Unions and CalPERS disagree. They stress that a member's disability status is only made public if they appeal CalPERS' denial of their application for disability retirement. They suggest that a member's decision to appeal is equivalent to a decision "to make public their request for disability benefits" and/or acts as a waiver of their privacy rights. (Opp. at 18:2-6; see also 7:13-14 ["In so appealing, the member makes a conscious decision to put his or medical conditions at issue in a legal proceeding."].) They argue that this supports their argument that CalPERS members have a reasonable expectation that their disability status will remain confidential – at least so long as they never file an appeal. Although this argument is colorable, the Court nonetheless still finds that CalPERS's public disclosure of detailed information about claimed disabilities if a member files an appeal tempers the reasonableness of any expectation that disability status will never be publically disclosed. Moreover, as Petitioner notes, although CalPERS does not disclose retirement type, numerous other public retirement systems do. Indeed, Petitioner has identified 23 public retirement systems in California that have provided it with retirement type in response to a PRA request. (Fellner Decl., ¶ 6.) Although CalPERS acknowledges this fact, it notes these other retirement system operate differently. For example, it notes the board of the Los Angeles City Employees' Retirement System decides disability

retirement applications and announces the results at public meetings. With CalPERS, in contrast, staff decides disability retirement applications, and the results are only disclosed at public meetings if staff denies the application and the member appeals the denial. This may be true, but it is not dispositive. "Whether or not a particular type of record is exempt should not depend upon the peculiar practice of the government entity at issue – otherwise, an agency could transform public records into private ones simply by refusing to disclose them over a period of time." (*International Federation, supra*, 42 Cal. 4th at 336.) The fact that numerous public retirement systems in California disclose the type of information requested by Petitioner diminishes the reasonableness of any expectation of privacy on the part of CalPERS members. (See *Id.* [fact that numerous other governmental entities disclose information about public employee salaries supports "the conclusion that any expectation of privacy that public employees may have that their salaries will be confidential is not reasonable."]; *Sonoma County, supra*, 198 Cal.App.4th at 999, fn.6 [rejecting county retirement system's argument "that its own practice of treating individual benefit information as confidential, which it concedes is not the universal practice among CERL retirement systems, should be given 'great weight' in construing the statute."].)

The fact that numerous public retirement systems in California disclose the type of information requested by Petitioner also diminishes the Union's fear that disclosing this information will discourage members from applying for disability retirement out of fear that their disability status will be publically disclosed, or will lead to harassment of retirees who suffer from hidden disabilities. In other words, if the Union's fears were well-founded, one would expect there to be at least some evidence of actual adverse consequences suffered by retirees of these other systems as a result of the disclosure. Here, the record contains no such evidence. (See *San Diego County, supra*, 196 Cal.App.4th at 1246.)

The Unions also challenge Petitioner's stated purpose for requesting information on retirement type: to investigate pension fraud. The Unions claim Petitioner actually wants this information "to discourage disability pensions entirely, even legitimate ones, by bullying those with hidden disabilities into foregoing application for a disability pension or else risk public disclosure of their sensitive medical histories." (Opp. at 21:22-25.) It is axiomatic, however, that the purpose for which records are requested is irrelevant to whether the records are subject to disclosure under the PRA. (§ 6257.5 [PRA "does not allow limitations on access to a public

record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure."]; *City of San Jose, supra*, 74 Cal.App.4th at 1018 ["The purpose of the requesting party in seeking disclosure cannot be considered."]; *Connell v. Superior Court* (1997) 56 Cal. App. 4th 601, 616-17 ["The purpose for which the requested records are to be used is not just 'generally' irrelevant; we have specifically held, 'What is material is the public interest in disclosure, not the private interest of a requesting party; section 6255 does not take into consideration the requesting party's . . . motives or needs.'"].)

Based on the above, the Court finds that although retirees do have an interest in avoiding disclosure of the fact that they are receiving a disability retirement (as opposed to a service retirement), that interest is not particularly strong. Balanced against this is "the strong public interest in knowing how the government spends its money." (*International Federation, supra*, 42 Cal.4th at 333.) "Although one does not lose his right to privacy upon accepting public employment, the very fact that he is engaged in the public's business strips him of some anonymity." (*Sacramento County, supra*, 195 Cal.App.4th at 468.) Public pensions are publically funded. (See *Id.* at 469; *Sonoma County, supra*, 198 Cal.App.4th at 1005.) Information about public pensions thus "is not private information that happens to be collected in the records of a public entity. Rather, it is information regarding an aspect of government operations, the disclosure of which contributes to the public's understanding and oversight of those operations by allowing interested parties to monitor the expenditure of public funds." (*Sacramento County, supra*, 195 Cal.App.4th at 468.) As a result, "public employees lack a reasonable expectation of privacy in an expense the public largely bears after their retirement." (*San Diego County, supra*, 196 Cal.App.4th at 1242.) "[R]etirees' publically funded pensions – like their previous salaries – are of interest to the public, and only through disclosure can the public expect to prevent abuse." (*Id.*) "The public is, of course, interested in knowing the total amount of pension payments, *but it also has a legitimate interest in knowing how pensions are calculated.* The [PRA's] core purpose is to prevent secrecy in government and contribute significant to the public understanding of government activities." (*Id.* at 1244, italics added.) "[T]he disclosure of pension information provides information about the government's management of public funds, in which the public has a legitimate interest." (*Id.* at 1247.)

As noted above, it is the Union's burden to demonstrate that disclosing retirement type would constitute an unwarranted invasion of privacy. Based on the above, the Court finds they

have failed to meet that burden.

CONCLUSION

No appellate court has considered the precise issue raised by this case – whether CalPERS must disclose retirement type, i.e., whether a particular retiree is receiving service or disability retirement benefits. Three appellate courts, however, have adopted the reasoning of an Attorney General opinion that held "statements as to . . . disability" and "retirement option elections" are made confidential by section 20230 and need not be publically disclosed. (25 Ops. Cal. Atty. Gen. at 91.) The Court finds that retirement type is both a statement as to disability (at least as to those retirees receiving a disability retirement) and a retirement option election, and is thus confidential. The Court also finds that identifying which retirees are receiving disability retirement benefits is tantamount to disclosing information provided by those retirees and their physicians to CalPERS to support the claim of disability, which, again, is made confidential by section 20230. Thus while the Court finds that the information sought does not constitute an unwarranted invasion of privacy, it does find that it is confidential pursuant to Government Code Section 20230. The petition is thus denied.

Dated: November 6, 2019

Laurie M. Earl
Judge of the Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the ORDER AFTER HEARING ON PETITION FOR WRIT OF MANDATE in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

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Dated: Novemer 6, 2019

Superior Court of California,
County of Sacramento

By: D. Bearor,
Deputy Clerk

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CASE TITLE : Nevada Policy Research Institute vs.California Public Employees Retirement System

Superior Court of California,
County of Sacramento

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